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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KALANI A. TEO, Defendant and Appellant.	B203585 (Los Angeles County Super. Ct. No. TA088898)

APPEAL from a judgment of the Superior Court of Los Angeles County. John T. Doyle, Judge. Affirmed.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Kalani A. Teo (appellant) appeals from the judgment entered following a jury trial resulting in his conviction of assault by means of force likely to produce great bodily injury and with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[1] The trial court granted formal probation for three years on condition that appellant serve one year in the county jail.

Appellant contends that: (1) there was *Batson-Wheeler* error (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*));[2] (2) the trial court abused its discretion when it precluded appellant from recalling and further impeaching the victim, Davis; (3) the trial court improperly refused jury instructions on self-defense; and (4) the trial court abused its discretion when it charged the jury with CALJIC No. 2.28 as a sanction for belated discovery.

We affirm the conviction.

FACTS

During the evening hours of January 26, 2007, Arthur Davis (Davis) and Marvin Hill (Hill) had an automobile accident at the corner of Central Avenue and Century Boulevard in Los Angeles. Davis turned left as Hill was turning right onto the same street, and their cars collided. Afterwards, according to Davis, appellant, a passenger in Hill's car, became irate and charged him. As appellant approached, Davis yelled out that he had insurance, even though that was a lie. Appellant punched Davis in the face, and Davis fell. Appellant then kicked Davis hard several times in the head and torso with feet that were shod in steel-toed boots. Davis lost consciousness. When Davis regained consciousness, he stumbled into a nearby Auto Zone store.

Davis suffered blunt force trauma to his face and torso.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *Wheeler* was overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 173, which held that California's "'more likely than not'" standard for a prima facie case was at odds with the standard required by *Batson*.

Davis's 12-year-old passenger and a female bystander, E.V., a woman employed by a fish market, corroborated Davis's claim that he did not approach appellant or Hill, as well as Davis's version of the assault.

After a *Miranda* waiver (*Miranda v. Arizona* (1966) 384 U.S. 436), appellant told a police officer that he "got into a fight" with Davis.

In defense, appellant declined to testify. Hill and another woman who claimed to be a bystander and an eyewitness, Rickeyta Thompson (Thompson), testified that Davis belligerently approached appellant, who blocked Davis's assault with his arms. Davis then slipped and fell and hit his head on the curb. Hill denied seeing appellant kick Davis, and Thompson claimed that at that point, she had returned to the Laundromat where she was washing clothing. She did not see any kicking.

DISCUSSION

I. The *Wheeler-Batson* Contention

With her third peremptory challenge, the prosecutor excluded Juror No. 4162, an African-American woman. Appellant objected on *Batson-Wheeler* grounds, and his objection was overruled. (*Batson, supra,* 476 U.S. 79; *Wheeler, supra,* 22 Cal.3d 258.) On appeal, appellant contends that he was entitled to have the trial court grant his motion to have the particular panel from which his petit jury was being selected dismissed, and to be tried by a petit jury selected from a newly-assembled panel randomly selected from the venire.[3]

Appellant's contention fails to persuade us.

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[3] To be precise in the use of terms, we referred to the decision in *People v. Bell* (1989) 49 Cal.3d 502, 520, footnote 3. The jury "pool" is the master list of eligible jurors compiled for the year or shorter period from which persons will be summoned during the relevant period for possible jury service. A "venire" is the group of prospective jurors summoned from that list and made available, after excuses and deferrals have been granted, for assignment to a "panel." A "panel" is the group of jurors from that venire assigned to a court and from which a jury will be selected to try a particular case. (See also *People v. Massie* (1998) 19 Cal.4th 550, 580, fn. 7.)

A. Background

The African-American prospective juror in question (Juror No. 4162) is an administrative assistant at a freight company who lives in Los Angeles. Her 18-year-old son lives with her and studies business at El Camino College. During voir dire, Juror No. 4162 indicated that she had no previous jury experience, she had never been a trial witness, and she had not been the victim of a crime.

When the prosecutor excluded Juror No. 4162 with a peremptory challenge, trial counsel objected on *Batson-Wheeler* grounds. Trial counsel claimed that the prospective juror's voir dire responses indicated a lack of bias. Counsel observed that this was the third female and the first African-American prospective juror that the prosecutor had excluded by the use of a peremptory challenge. Counsel complained that the exclusion "just reek[ed] of [an] inappropriate use of race as a factor."

The trial court commented that it believed that the prospective juror's replies were "very, very innocuous." It asked the prosecutor to disclose the reasons for the exclusion.

Initially, the prosecutor replied, "Well, first of all, my victim is African-American, and [appellant] is not." Trial counsel interrupted and said: "I'm sorry, [appellant] is African-American. Just for the record. I don't know why [the prosecutor has come up with such a claim]. He is African-American."

The prosecutor explained her reason for the exclusion. Juror No. 4162 had an 18-year-old son. (Appellant was 18 years old at the time of the assault and 19 years old at the time of trial.) The prosecutor said that she was concerned that the prospective juror would "identify" and "have a difficult time" as there might be a feeling that "boys will be boys." Also, the prosecutor anticipated that the defense would call character witnesses at trial who would testify that appellant was a good boy. The prosecutor believed there was a risk that the prospective juror would identify with someone of appellant's age because she had a son of the same approximate age. Also, for that reason, the prospective juror might have a hard time returning a guilty verdict. The prosecutor said that Juror No. 4162's other replies were "acceptable," but that the prosecutor had "a gut feeling based on that."

Trial counsel protested there were other prospective jurors with teenage sons: Juror No. 9656 had a 17-year-old son, Juror No. 9052 had teenage sons, and there were others. Counsel argued, "I think that's thin," and said the proffered reason was pretextual.

The prosecutor remarked that Juror No. 4162 was the only prospective juror that she recalled who had an 18-year-old son. The prosecutor inquired whether the trial court was finding a prima facie case of an exclusion based on group bias.

The trial court replied, as follows: "I don't have to find it first. I can do it either way. I can ask you prior to finding a prima facie case. I'll overrule the [*Batson-Wheeler* objection], but I will indicate that that's thin in terms of your reasoning, but I'll overrule it. You have a defendant who might be identified with her son. She may have empathy for him. I'll allow it. I'll overrule it."

After the ruling, during a recess in the voir dire, the prosecutor elaborated for the record on her reasons for the exclusion. The prosecutor said: "[W]hat I heard when that juror sat down was one of the first things she stated was that 'I have an 18-year-old son.' To me, she projected. That's one of the most important things. I heard that she was a single mom, and I felt concern particularly in light of [appellant having cut] his hair [and cleaned] up his act. And also being so apparently young looking that jurors sometimes do think about punishment . . . and I felt that [the prospective juror would have] a hard time overcoming any sympathy or projection of her son particularly thinking this is a young man, this is a serious offense, that sort of thing."

The prosecutor added that Juror No. 4162 had exhibited "a very soft spoken demeanor" when the prosecutor questioned her during voir dire about the concept of reasonable doubt. The prosecutor explained that she had posed hypotheticals on reasonable doubt to a number of the prospective jurors so as to deliberately elicit audible "Guilty" and "Not Guilty" responses. The prosecutor explained that she believed that if a prospective juror has difficulty replying, "Guilty," to such voir dire inquiries, the hesitant response may indicate that the prospective juror will also have difficulty returning a guilty verdict. The prosecutor did not hear Juror No. 4162 say "Guilty" during the

inquiry; the prospective juror had simply mouthed the word. Then, immediately thereafter, Juror No. 4162 was very assertive in making a "Not Guilty" response to the inquiry concerning reasonable doubt.

Additionally, Juror No. 4162 had no jury experience, she had never been a trial witness, and she had never been the victim of a crime.

The prosecutor explained that when she exercised her peremptory challenge, there were three other "African-Americans coming onto the jury."

The trial court replied, "That doesn't count." It said the focus of a proper *Wheeler* decision was on the particular individual excluded, not on how many other prospective jurors of that cognizable group were in the jury box or on the panel when the exclusion occurred.

The prosecutor offered one more observation: "And I understand [appellant's] mom was at the preliminary hearing. . . . So all those factors for a person who's easily able to identify her own feelings which was my concern would play into that, and I just wanted the court [to be aware] of those reasons."

Trial counsel responded that the further proffer simply bolstered the defense claim that the prosecutor's reasons were pretextual. Counsel claimed that Juror No. 4162 did not spontaneously volunteer the information about her son as the prosecutor implied—Juror No. 4162 had disclosed her son's existence at the appropriate time during the introductory remarks required by the trial court at the commencement of the prospective juror's individual voir dire. Insofar as Juror No. 4162 was soft spoken, so were at least half of the other prospective jurors. Trial counsel heard Juror No. 4162 say, "Guilty," in response to the prosecutor's inquiry concerning reasonable doubt. When the prosecutor elicited the prospective juror's subsequent "Not Guilty" response, the juror spoke up more loudly than before apparently because she realized that her previous reply was so soft that it might not have been heard.

The prosecutor disputed trial counsel's claims and repeated that Juror No. 4162's manner in saying "Not guilty" was "most assertive." The prosecutor insisted that she had been paying particular attention to the response. The prosecutor then conceded that

another prospective female juror had disclosed that she had 19- and 11-year-old sons. The prosecutor remarked, "But [Juror No. 4162] is a single woman with an 18-year-old boy, and that's all I have to say."

When the *Batson-Wheeler* motion was made, another African-American, a male prospective juror, Juror No. 0071, was seated in the No. 7 seat in the jury box. The prosecutor later exercised her fifth peremptory challenge to exclude Juror No. 0071. Appellant made another objection to the exclusion on *Batson-Wheeler* grounds, and the objection was overruled. However, on appeal, appellant concedes that the trial court's ruling concerning Juror No. 0071 is supported by the record. The prospective juror had a younger brother who was a pharmacy student and was not gang-involved. The brother recently had been murdered in an apparent gang shooting. The prospective juror expressed a doubt in the circumstances as to whether he could be fair and revealed that he was still grieving for his brother's death. Also, during the police investigation, there had been friction between the police officers and the family. Thus, there was no question that the prosecutor's exclusion of Juror No. 0071 was race neutral and genuine.

When the prosecutor exercised the prosecutor's peremptory challenge against Juror No. 4162, Jurors Nos. 1703, 9656, and 9052 were seated respectively in the Nos. 2, 3, and 11 seats in the jury box. These female jurors remained on the petit jury when it was sworn to try the case.

Juror No. 1703 was a Lakewood bank employee who was married to a longshoreman. She had two adult children who were in sales. She had been the victim of a residential burglary and had witnessed a bank robbery. Juror No. 9656 was a Huntington Park administrative assistant with three children, ages 10, 8, and 18 months. She was married to a service worker for a water company. The prospective juror had not previously served on a jury, nor had she ever been a witness to a crime. Juror No. 9052 was a Paramount legal secretary who was also married to a longshoreman. She had two children, one of whom was a 19-year-old son. Her son was in college and worked as a security guard. Her younger child was age 11. The prospective juror had previously

served on a jury that had reached a verdict. She had not witnessed any crime, and she had not been the victim of a crime.

The parties each exercised six peremptory challenges one after the other and then accepted the jury.

B. The Relevant Legal Principles

Recently, in *People v. Lenix* (2008) 44 Cal.4th 602 (*Lenix*), the court explained the relevant legal principles, as follows.

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. (*Batson, supra,* 476 U.S. at p. 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *Wheeler, supra*, 22 Cal.3d at pp. 276–277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] . . .

"The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims. [Citations.]

"A prosecutor asked to explain his conduct must provide a '"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' (*Batson, supra,* 476 U.S. at p. 98, fn. 20.) 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one

that does not deny equal protection. [Citation.] Certainly a challenge based on racial prejudice would not be supported by a legitimate reason.

"At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citations.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her.

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.]" (*Lenix, supra*, 44 Cal.4th at pp. 612–614, fns. omitted.)

C. The Analysis

1. The Two Threshold Issues

Appellant's argument on appeal is, as follows. He claims that he established that one prospective juror was excluded on the impermissible ground of group bias. Juror No. 4162 was an African-American female and thus was the member of two cognizable groups, African-Americans and females. He asserts that the record raises a reasonable inference that Juror No. 4162 was improperly excluded inasmuch as the prosecutor's primary and explicit reason for exclusion was the prospective juror's race. Also, the other reason for the exclusion—that the prosecutor was afraid the prospective juror might

sympathize with appellant because the juror's son and appellant were the same age—had been shown to be "specious" as the prosecutor failed to challenge three other non-African-American prospective jurors who served on the jury who also had teenage or young adult children.

At the threshold, the People raise an issue concerning whether the trial court's ruling addressed the first or the third step in the *Batson* inquiry. We agree that the record is not entirely clear in establishing the nature of the trial court's ruling. This court cannot determine whether the trial court concluded there was a prima facie case or not, or whether the trial court was ruling on the ultimate issue of the pretextual nature of the prosecutor's justifications for exclusion. Thus, despite substantial doubts about whether appellant demonstrated a prima facie case, this court will review the ruling as if it were the trial court's ultimate acceptance of the prosecutor's reason for the exclusion. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 135–136 (*Arias*) [the trial court's ruling was ambiguous, and the reviewing court bypassed the issue of a prima facie case and determined there was substantial evidence to support the trial court's ruling on the ultimate issue of purposeful discrimination]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1009–1010 [where there were seven African-American prospective jurors excluded by the prosecutor's peremptory challenges, the trial court had previously made several findings of a prima facie case of purposeful discrimination, and the trial court's last ruling was cryptic, the reviewing court disposed of the appeal by treating the ruling as a final ruling on purposeful discrimination]; *People v. Ward* (2005) 36 Cal.4th 186, 200–201 [on appeal, the People conceded the issue of whether there was a prima facie finding was moot, and although there was doubt on review as to whether that concession was sufficient to require an examination of the adequacy of the prosecutor's justifications, the trial court assumed a prima facie showing and disposed of the case by treating the ruling as if it was the final ruling on purposeful discrimination]; cf. *People v Mayfield* (1997) 14 Cal.4th 668, 726–727 [where the trial court denied the *Batson-Wheeler* claim because it found no prima facie case and the prosecutor had offered satisfactory, nondiscriminatory reasons for the exclusions, the reviewing court, for

simplicity, reviewed only the prosecutor's reasons for challenging the prospective jurors].)

Also, as a practical matter, reviewing the prosecutor's reasons for exclusion appears to be appropriate as appellant's contention rests almost entirely upon the credibility of the prosecutor's justifications.

This court also observes that appellant misstates his record. At no time did the prosecutor proffer as a reason for the exclusion that she had exercised the peremptory challenge against Juror No. 4162 on the basis of the prospective juror's race. It is evident from reading the record that the prosecutor's remarks were directed to another issue—the prosecutor was unaware of appellant's ethnicity and believed that appellant was not African-American. According to the decision in *Wheeler*, that point is relevant to showing the absence of discriminatory intent. (W*heeler, supra,* 22 Cal.3d at pp. 280–281 [the appellant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition, his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the trial court's attention].)

2. Review of the Prosecutor's Reason for Exclusion

"[W]e review the trial court's denial of a *Wheeler/Batson* motion deferentially, considering only whether substantial evidence supports the trial court's conclusions." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341–342.) "Evidence is substantial if it is reasonable, credible and of solid value. [Citations.]" (*Lenix, supra*, 44 Cal.4th at p. 627.) "The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried." (*Arias, supra*, 13 Cal.4th at p. 136.)

At the third stage of a *Batson* review, "'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' (*Miller-El* [v. *Dretke* (2005)] 545 U.S. [231,] 339.) In

assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her. [Citation.]" (*Lenix, supra*, 44 Cal 4th at p. 613, fn. omitted.)

"[T]he question of purposeful discrimination . . . involve[s] an examination of *all* [the] relevant circumstances. Comparative juror analysis [is] only one part of the . . . review." (*Lenix, supra*, 44 Cal.4th at p. 626.) Our review is deferential with respect to matters that likely will not appear from the cold record because it "is the trial court which is best able to place jurors' answers in context and draw meaning from all circumstances, including matters not discernable from the cold record." (*Id.* at pp. 626–627.) "'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' [Citation.]" (*Lenix, supra*, at pp. 613–614.)

When conducting a comparative review, "[t]he reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. Further, the trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments." (*Lenix, supra*, 44 Cal.4th at p. 624.)

The rationale for a comparative review is, as follows. If a prosecutor has proffered a reason for striking an African-American prospective juror that applies just as well to an otherwise similar non-African-American whom she has left on the jury, this may provide some circumstantial evidence that the prosecutor's reason was pretextual. (*Lenix, supra*, 44 Cal.4th at p. 627.) However, "comparative juror analysis on a cold appellate record has inherent limitations." (*Id*. at p. 622.)

The product of a comparative review is circumstantial evidence, not direct evidence. "[U]nlike direct evidence, circumstantial evidence does not directly prove the fact in question. Instead, circumstantial evidence may support a logical conclusion that the disputed fact is true. But information may often be open to more than one reasonable deduction. Thus, care must be taken not to accept one reasonable interpretation to the exclusion of other reasonable ones. With regard to an appellate court's review of circumstantial evidence, [the court has] observed: '"'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'"' [Citation.] This same principle of appellate restraint applies in reviewing the circumstantial evidence supporting the trial court's factual findings in a *Wheeler/Batson* holding." (*Lenix, supra,* 44 Cal.4th at pp. 627–628.)

Also, the record will not reflect all aspects of the human communication that occurs during voir dire. "Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning.'" (*Lenix, supra,* 44 Cal.4th at p. 622.) Two panelists may appear to be similarly situated based on their recorded oral responses when the prospective jurors' demeanor may have communicated considerably more. (*Id*. at p. 623.) Jury selection is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled. (*Ibid*.) The combination and mix of the jury will change as prospective jurors are removed from and seated in the jury box. At some point, the panel as seated may still contain a number of prospective jurors that the party will believe will favor the other side, but it appears considering the remaining panelists that the party has reached the best jury possible given the seated prospective juror and the panel as a whole. (*Ibid*.)

Appellant asserts that he has proved that the prosecutor's reason for exclusion was pretextual and that the exclusion is race-based because when the voir dire responses of Jurors Nos. 1703, 9656, and 9052 are considered side-by-side with those of Juror No. 4162, it is apparent that the jurors were all similarly situated, and only the African-

American prospective juror was excluded. Thus, appellant argues, there is circumstantial evidence of a peremptory challenge impermissibly based on race.

Our review of the totality of the evidence leads us to the conclusion that the trial court's ruling is supported by substantial evidence. The prosecutor exercised only six peremptory challenges, and the challenge in question was only the prosecutor's third peremptory challenge. There was no statistical support for finding the exclusion was impermissibly based on race. When appellant raised the instant *Batson-Wheeler* objection, the prosecutor had exercised only this one peremptory challenge against an African-American prospective juror. Another African-American prospective juror remained among the prospective jurors seated in the jury box. Three other African-American panelists were among the prospective jurors who might later be seated in the jury box.

Juror No. 4162's responses during voir dire failed to indicate bias. However, that was the only evidence militating toward a discriminatory exclusion. The reason for the exclusion proffered by the prosecutor was on its face race-neutral and a statement of specific bias properly related to appropriate trial tactics in the case. There was no evidence in the record that the trial court put undue limits on the jury voir dire by the parties, or that the prosecutor engaged in desultory voir dire of minority prospective jurors.

There were other female prospective jurors who were seated in the jury box at the time of the objection who were retained on the jury, and these jurors were non-African-American women who were married with older children. However, a comparative review at this early stage of the jury selection process fails to persuade us that the prosecutor's reason for the exclusion was pretextual. None of the three jurors appellant refers to on appeal was a single mother. Whether or not the prosecutor's premise for the exclusion was credible or rational, a prosecutor could well entertain a sincere belief that a single mother might be more emotionally involved with her one college-age son and more dependent on him than a married female juror with a husband and several children, or several children in different age brackets, or children who no longer lived at home.

Insofar as Juror No. 4162 was a single mother with one college-age son living with her, none of the other jurors was similarly situated. Even if we ignore the marital status of the other jurors, only Juror No. 1703 had a son in college who was approximately the same age as appellant and Juror No. 4162's son. And it was not apparent from the record whether or not that child lived with his parents. Trial counsel asked the trial court to consider a similar comparative review, and the trial court did not comment on its conclusion concerning that defense argument. We will therefore assume that the trial court was not persuaded on this point.

The inherent limitations of comparative juror analysis can be tempered by creating an inclusive record. (*Lenix*, *supra*, 44 Cal.4th at p. 624.) However, here, trial counsel did not fully illuminate the events of the jury selection such that this court is certain that it has a complete record of the proceedings. Also, in ruling on the *Batson-Wheeler* objection, the trial court questioned the prosecutor's proffered reason for the exclusion, indicating that the trial court was engaged in the proper *Batson* procedure as it was skeptically examining the prosecutor's justification for exclusion. The removal of the other African-American juror who was seated in the jury box was justified by that prospective juror's voir dire responses.

After the jury selection was complete, appellant failed to renew this same *Batson-Wheeler* objection for the trial court to reconsider its ruling, waiving consideration of any later information that that was apparent to the trial court that might have supported the contention.

This court finds no evidence in the record causing it to doubt the trial court's earnest efforts to evaluate the sincerity and genuineness of the justification for excluding Juror No. 4162. Considering the totality of the circumstances above, appellant has not demonstrated his entitlement to a reversal on *Batson-Wheeler* grounds.

II. Impeachment

Appellant contends that the trial court abused its discretion and violated his constitutional right to present a defense when it prevented him from impeaching Davis's trial testimony.

The contention lacks merit.

A. Background

During recross-examination, trial counsel questioned Davis about whether he had been informed by a deputy district attorney or by a witness coordinator that he was entitled to obtain compensation from the witness compensation fund. Davis replied that he did not understand. Trial counsel repeated her question, and Davis replied, "Nobody told me how to get nothing." Trial counsel asked whether someone from the Office of the District Attorney had paid for his lunch that day. Davis said, "No. Not from the D.A.'s office."

On further redirect examination, the prosecutor asked Davis whether he had lunch with a detective involved in the case who had paid for his lunch. She also asked whether Davis was aware that the detective had been reimbursed by the Office of the District Attorney for his lunch. Davis indicated that he was unaware of such facts.

On further recross-examination, trial counsel asked whether Davis had lunch with the prosecutor and the detective. Davis replied, "No, I didn't."

The trial court excused Davis as a witness.

The following day, the prosecutor informed the trial court that after Davis left the witness stand the previous evening, she had asked Davis some additional questions about whether he had received witness compensation. Davis told her that he had applied for victim compensation. She inquired why he had failed to disclose that during his testimony. Davis replied that he was not asked whether someone from the district attorney's office had told him about the compensation. Also, no one from the district attorney's office had discussed the matter with him. He explained that he was previously aware of the victim compensation fund and that he had taken it upon himself to apply for victim compensation at the appropriate office in the courthouse. He told the prosecutor that he had spoken to "Sylvia" in the witness coordinator's office. Pursuant to the prosecutor's inquiry, Davis told her that he had been unaware that Sylvia was a member of the district attorney's office.

The prosecutor then spoke to Sylvia. Sylvia checked her computer and informed the prosecutor that Davis had been approved for victim compensation. However, Davis had not yet submitted his medical bills for reimbursement.

The prosecutor claimed that Davis had answered the trial inquiries put to him honestly and truthfully. And, any further effort at impeachment on the issue was collateral. She asked the trial court to preclude the defense from recalling Davis to question him about applying for compensation. She also asked for a preclusion order with respect to calling Sylvia as a witness to impeach Davis.

The trial court and counsel reread the record of Davis's questioning the previous day.

The prosecutor repeated elements of her conversation with Davis. She further indicated that Davis had told her that he was unaware that the office where he made his application was part of the District Attorney's Office. She added that she always instructs her witnesses to answer only the questions asked, which is what Davis had done. She claimed that Davis was easily confused.

Trial counsel urged that Davis's claims during the prior questioning were disingenuous.

The trial court ruled that the impeachment was collateral, and it excluded the impeachment pursuant to Evidence Code section 352, and it commented that the impeachment was at best relevant only to credibility. The trial court observed that Davis's testimony on this collateral point was not that probative on the primary trial issues of whether appellant attacked Davis and whether appellant was the aggressor.

B. The Analysis

It is well established that although "it is improper to elicit otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it [citation], the trial court has discretion to admit or exclude evidence offered for impeachment on a collateral matter. [Citations.]" (*People v. Mayfield, supra*, 14 Cal.4th at p. 748; accord, *People v. Gurule* (2002) 28 Cal.4th 557, 620.) Our review of such rulings is deferential. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10.)

As the trial court observed, further cross-examination of Davis concerned collateral impeachment of a witness's credibility on issues unrelated to the case. Recalling Davis for collateral impeachment about obtaining compensation from the victim compensation fund was a matter entirely within the discretion of the trial court. (*People v. Redmond* (1981) 29 Cal.3d 904, 913.) It is settled that Evidence Code section 352 permits a trial court to prevent criminal trials "'from degenerating into nitpicking wars of attrition over collateral credibility issues.'" (*People v. Smith* (2007) 40 Cal.4th 483, 512 (*Smith*), quoting from *People v. Wheeler* (1992) 4 Cal.4th 284, 296.) That danger was presented here, and the trial court properly exercised its discretion by preventing further cross-examination or the calling of an additional witness that had the potential of distracting the jury from the true issues in the case.

Davis had been previously impeached with his lie about having automobile insurance and with his prior felony convictions. Appellant was not prevented from presenting a defense. This further collateral impeachment have not produced a significantly different impression of Davis's credibility. (See *Smith*, *supra*, 40 Cal.4th at p. 513.)

III. The Request for Self-Defense Instructions

Citing *Chapman v. California* (1967) 386 U.S. 18, appellant contends that the trial court's refusal to give the requested jury instructions on self-defense constitutes constitutional error requiring a reversal.

We disagree.

A. Background

Davis, his 12-year-old passenger, and the bystander E.V. testified that Davis did not attack appellant and was mercilessly kicked by appellant once Davis fell to the ground and was helpless.

In defense, Hill testified that Davis walked over to them swinging his arms like a windmill. Hill stepped aside, and Davis continued on, "swinging" at appellant. Hill claimed that appellant's only response was to move "into like a defensive block." Hill saw appellant's arms moving, but "there was no head shots or in the stomach or anything

of that nature." The trial court indicated for the record that Hill had illustrated appellant's conduct and that Hill was moving his left and right arms up and down in a vertical manner as if making a defensive motion. Hill claimed that after that, Davis "did not stay up too long." Davis slipped off the curb and hit his head on the curb.

During cross-examination, the prosecutor asked whether Hill had seen appellant kick Davis. Hill replied, "Not at all." Hill indicated that after stepping aside to avoid Davis, he did not know what happened to Davis. The prosecutor inquired whether Davis was still on the sidewalk when the officers arrived, and Hill replied, "I think so."

Hill admitted that he told the public defender's investigator that Davis's injuries were a result of the traffic accident and a fall. (Davis had explicitly denied during his trial testimony that he was injured during the traffic accident.)

Thompson, who had been doing her laundry at the Laundromat near the accident scene, testified that she came outside and walked down the street to the accident scene. She said that when the "little old guy," i.e., Davis, got out of his car, he was "hysterical, belligerent, [and] talking crazy." Davis had approached the younger men pointing his finger at them and "punching" at them. When Davis got within two feet of him, appellant had stepped back and used his arms to block Davis's blows. Davis then fell off the curb, lay there, and rolled over. At that point, she left as she had to "go check [her] clothes."

She never saw appellant hit Davis or contact Davis, except when appellant blocked the blows at his face. After Davis fell, she returned to the Laundromat.

Trial counsel acknowledged that no defense witness had testified at trial that he or she saw appellant ball up a fist and punch Davis when he was attacked by Davis. Nevertheless, the testimony was that appellant "was moving in a defensive manner while he was being attacked." She claimed that such evidence was sufficient to require instructions on self-defense.

The trial court observed that the defense witnesses did not testify to contact and that the defense witnesses said that Davis had slipped. Trial counsel took the position that the witnesses were uncertain about contact. She argued that there was substantial evidence that Davis was attacking appellant, and in the circumstances, appellant could

have acted in self-defense. She then qualified her assertion by saying, "I can't say definitively that [appellant] struck [Davis] with a closed fist because nobody said that. But I think [there is] a reasonable inference" that appellant could have hit Davis because appellant was moving his arms defensively.

After listening to counsels' remarks, the trial court refused the request for the instruction. It said that the evidence failed to support a claim of self-defense: the defense evidence was that Davis had swung at appellant and had slipped on the curb in doing so.[4]

B. The Relevant Legal Principles

Requested instructions on a defense must be given if they are supported by substantial evidence, rather than "minimal and insubstantial" evidence. (*People v. Flannel* (1979) 25 Cal.3d 668, 684–685.) Evidence is substantial if a reasonable jury could find the existence of the particular facts underlying the instruction. If the evidence is substantial, the trial court is not permitted to determine the credibility of witnesses, which is a task for the jury. (*People v. Wickersham* (1982) 32 Cal.3d 307, 324–325, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Strozier* (1993) 20 Cal.App.4th 55, 63.)

To have acted in self-defense, a defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of imminent danger to life or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.)

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4 In defining assault, the trial court nevertheless used the following passage from the pattern instruction CALJIC No. 9.00. "A willful application of physical force upon the person of another is not unlawful when done in lawful self-defense or defense of others. The People have the burden to prove that the application of physical force was not in lawful self-defense of others. If you have a reasonable doubt that the application of physical force was unlawful, you must find the defendant not guilty."

C. The Analysis

On appeal, appellant argues that he was entitled to the instructions because the evidence supports a reasonable conclusion that in stepping back and blocking the blows, appellant "hit Davis in the process, causing him to fall down."

Appellant did not testify, and the circumstances do not indicate that Davis was a threat to appellant. Davis was old and small, and appellant was young, tall, and strong. The defense witnesses testified to circumstances in which appellant merely blocked Davis's aggressive advance. There was no evidence of contact, and if there was evidence of contact, the witnesses claimed that appellant had done nothing more than block Davis's ineffectual blows. On this record, instructions on self-defense were not required. (*People v. Perez* (1970) 12 Cal.App.3d 232, 236 [an instruction on self-defense must be based upon more than imagined facts or inferences].)

Furthermore, any error in failing to instruct on self-defense based on the evidence that Davis initially charged appellant or may have hit Davis while blocking him amounts to harmless error. Even if appellant was initially entitled to act in self-defense, he lost that justification after Davis fell to the ground and appellant engaged in excessive force in kicking Davis. The defense witnesses Hill and Thompson could not offer any evidence on that point. Their testimony was that thereafter their attention was diverted to other matters, and they saw nothing. On the other hand, the prosecution witnesses said that appellant had viciously kicked Davis numerous times when Davis was helpless. A police officer observed steel-toed boots on appellants' feet.

Such evidence overwhelmingly establishes that appellant could not in any event reasonably assert self-defense subsequent to the initial attack. (*People v. Goins* (1991) 228 Cal.App.3d 511, 516 [to justify self-defense, the appellant must have an honest and reasonable belief that bodily injury is about to be inflicted on him].) The use of excessive force in kicking Davis with the steel-toed boots destroyed any justification appellant may have had for the use of force. (*People v. Harris* (1971) 20 Cal.App.3d 534, 537–538.) Thus, regardless of who was the initial aggressor, appellant's kicking established felonious assault, and no rational jury would have acquitted appellant based on the

evidence. (*People v. Cross* (2008) 45 Cal.4th 58, 72, citing *Neder v. United States* (1999) 527 U.S. 1, 18.)

IV. CALJIC No. 2.28

Appellant contends that the trial court abused its discretion by sanctioning appellant, and the jury instruction that constituted the sanction, CALJIC No. 2.28, was improper and prejudicial.

There is no basis in the record for a reversal.

A. The Background

On October 3, 2007, two days before trial, trial counsel gave the prosecutor Thompson's name and indicated that Thompson would be a character witness. Twelve days later, on the day that Thompson was scheduled to testify in defense, trial counsel informed the prosecutor and the trial court that Thompson was a percipient witness, not a character witness. Trial counsel admitted that she had made a mistake.

The prosecutor explained that she had been hampered in identifying Thompson and obtaining fingerprints, in part because of belated discovery and in part because Thompson did not return the prosecution's telephone calls seeking an interview. The prosecutor requested a sanction of witness preclusion for the belated discovery. After appellant's wife Janesha Teo (Teo) and Thompson testified in an Evidence Code section 402 hearing, the trial court declined to order witness preclusion. However, it found that trial counsel had been sloppy in her trial preparation and ordered the sanction of a jury instruction.

During jury instructions, the trial court charged the jury with a modified instruction based on the 2003 or 2005 version of CALJIC No. 2.28. In the alternative, the prosecutor had suggested the use of CALCRIM No. 306 as that instruction was simpler and more straightforward. The trial court refused to use the CALCRIM instruction on point and modeled its instruction on one of the early versions of CALJIC No. 2.28.

The trial court charged the jury, as follows.

"The prosecution and the defense are required to disclose to each other before the pretrial evidence each intends to present at trial so as to promote the ascertainment of the

truth, save court time, and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the noncomplying party's evidence. Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the defendant failed to timely disclose the following evidence: version of events as testified to by Rickeyta Thompson. Although defendant's failure to timely disclose evidence was without lawful justification, the court has under the law permitted the production of this evidence during the trial. The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence."

B. The Analysis

On appeal, appellant challenges the propriety of ordering the sanction of a jury instruction. He also asserts that giving the modified CALJIC No. 2.28 instruction was error as (1) the instruction punished appellant for acts that were attributable only to his trial counsel and (2) the instruction provided the jury with no guidance as to how the jury was to relate the delay in disclosure to the proof of guilt. Appellant cites in support of his contention the Court of Appeal decisions in *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1247–1248, *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942, *People v. Cabral* (2004) 121 Cal.App.4th 748, 751–752; and *People v. Bell* (2004) 118 Cal.App.4th 249, 255–259, which generally disapproved the use of CALJIC No. 2.28.

In this case, at best, any error was nonprejudicial. As we explained, the evidence supporting appellant's conviction of felonious assault was overwhelming. The evidence unequivocally showed that appellant kicked Davis numerous times as Davis lay helpless on the ground and used steel-toed boots to accomplish the vicious assault. Even if giving the modified CALJIC No. 2.28 jury instruction constitutes error, there is no reasonable probability that an outcome more beneficial to appellant would have occurred in the absence of the instruction. (*People v. Riggs* (2008) 44 Cal.4th 248, 311; *People v.*

Watson (1956) 46 Cal.2d 818, 836.) The instruction did not contribute to the verdict. (*People v. Riggs, supra*, at p. 311; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ